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7
8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF WATER
14 RESOURCES AND UNITED STATES
15 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
FOR CALIFORNIA WATERFIX

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**STATEMENT OF ISSUES PROPOSED TO
BE ADDRESSED IN CLOSING BRIEFS
FOR PART 1**

1 Petitioner Restore the Delta (RTD) submits this Statement of Issues Proposed to Be
2 Addressed in Closing Briefs for Part 1 of this hearing in response to the Hearing Officers' ruling of
3 December 19, 2016. That ruling invited parties to submit a concise statement of the issues that they
4 would like to address in a closing brief for Part 1, along with explanations why such issues would be
5 more appropriately briefed at the end of Part 1 rather than Part 2. The issues that RTD believes
6 would be appropriately addressed at the end of Part 1 rather than Part 2 are the following:

7 **Issue 1: Would granting the Petition in effect initiate a new water right?**

8 The first "key issue" identified to be addressed in Part 1 in the Notice of Public Hearing
9 (Notice) (October 30, 2015) for this hearing is: "Will the changes proposed in the Petition in effect
10 initiate a new water right?" (Notice, p. 11.) RTD's Part 1 case in chief offers extensive evidence that
11 the changes proposed in the Petition would effectively initiate a new water right. If that is the case,
12 the Petition is not merely one for a mere change in points of diversion, as Petitioners assert, but
13 rather the Petition project (Project) should be subject to a new water right application.

14 This issue would be more appropriately briefed at the end of Part 1 rather than Part 2 because
15 it has explicitly been identified as a key issue for Part 1 and thus would be better addressed
16 immediately following the close of the presentation of Part 1 cases in chief while the evidence on
17 this issue is fresh for all parties. Further, and more importantly, should the Hearing Officers
18 determine that the Petition in effect seeks to initiate a new water right that should be subject to a new
19 water right application, then the present hearing should come to an end and a new hearing
20 commence on any water right application that Petitioners might choose to file. That hearing would
21 focus on the legal requirements that apply to new water right applications rather than those
22 applicable to changes in points of diversion. It could significantly conserve the resources of the
23 Water Board and all parties to have this issue considered and decided at the end of Part 1 rather than

1 await the end of Part 2, which, depending on the Hearing Officers’ ruling, might be obviated by that
2 ruling.¹

3 **Issue 2: Have Petitioners met their burden to show that granting the Petition would not injure**
4 **any legal users of water, including environmental justice communities?**

5 The second area identified as a key issue for Part 1 in the Notice is whether the Petition’s
6 “proposed changes [will] cause injury to any municipal, industrial or agricultural uses of water,
7 including associated legal users of water.” (Notice, p. 11.) In their February 11, 2016 Pre-hearing
8 Conference Ruling, the Hearing Officers clarified that the water use injuries that are issues
9 appropriate for Part 1 include injuries to “human uses that extend beyond the strict definition of legal
10 users of water, including...environmental justice concerns.” (Pre-hearing Conference Ruling, p. 10.)
11 Despite this plain ruling, Petitioner DWR and other parties sought to limit the scope of Part 1B of
12 the hearing to injuries the Project posed to a narrow class of “legal users of water.” In response, the
13 Hearing Officers reiterated in their October 7, 2016 ruling on the scope of Part 1B that “human uses”
14 that involve “environmental justice concerns” were an issue for Part 1. (Ruling on Written
15 Testimony...and Other Procedural Matters, p. 2.)

16 In response to these rulings on the scope of Part 1, RTD presented extensive evidence on the
17 existence of various significant environmental justice communities in the legal Delta and of the
18 many injurious impacts that the Project would have on these communities. Such injuries include the
19 loss of livelihood that Delta farmworkers would suffer with increased salinity of irrigation water
20 available to the Delta farmers who employ them, injury to environmental justice communities in the
21 Delta that rely on subsistence fishing for basic nutrition, and increased contamination of both surface
22 water and groundwater upon which environmental justice communities in Stockton and elsewhere
23 rely for drinking and other domestic water uses.

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26 ¹ The Hearing Officers have expressly recognized that Part 2 may not be reached, underscoring the
27 utility of closing briefs following Part 1 to assist in a determination of whether Part 2 is necessary
28 and appropriate. (See California WaterFix Water Right Change Petition Hearing, Transcript, Vol. 33
(Dec. 8, 2016), p. 12: 16-19 [Hearing Officer Doduc stated: “So please start to think right now in
terms of what different process we might pursue for the rebuttal portion, *as well as going on, if we
do go on, into Part 2* and other parts of this hearing.” (emphasis added)]).

1 The October 7, 2016 ruling on the scope of Part 1B also notes that: “In Part 1B, we will
2 permit testimony concerning the potential, indirect economic impacts attributable to the proposed
3 changes in point of diversion, such as testimony concerning any costs attributable to any impacts to
4 water quality that may be caused by the proposed changes.” (Ruling on Written Testimony...and
5 Other Procedural Matters, p. 3.) RTD offered evidence of such impacts on environmental justice
6 communities, including increased costs to disadvantaged communities in the Stockton area for
7 adequately treated drinking water and economic injuries to businesses and their employees and
8 customers in economically distressed Stockton and surrounding areas, which are attempting to
9 recover from the area’s economic decline over the past decade.

10 RTD thus requests that the issues of whether and to what extent granting the Petition would
11 cause injury to the Delta’s environmental justice communities be a topic for Part 1 closing briefs,
12 along with injuries to other legal users of water. As with the issues concerning whether granting the
13 Petition would create a new water right, these issues would be more appropriately briefed at the end
14 of Part 1 than at the end of Part 2 because the Hearing Officers have taken the important step of
15 recognizing injuries to environmental justice communities’ use of water as among the issues to be
16 addressed in Part 1. The Water Board should thus consider the extent of these injuries while the
17 evidence is fresh on their minds, and specifically in the context of determining whether these amount
18 to injuries to legal users of water within the meaning of Water Code section 1228.7(a), given the
19 broader definition of legal users of water that the Hearing Officers have adopted for this hearing,
20 allowing consideration of injuries to environmental justice communities’ uses of water.

21 Further, to the extent that the Water Board finds that Petitioners have failed to meet their
22 burden to show that granting the Petition would not cause injury to environmental justice
23 communities’ use of water, that finding would call for the Water Board to adopt “specific
24 conditions...to avoid injury to these uses.” (Notice, p. 11.) The identification of such conditions
25 would help inform presentations in Part 2, when the Water Board will hear evidence concerning
26 whether granting the Petition would be in the public interest. (*Id.* p. 12.)

1 **Parties should be allowed to revisit any Part 1 issues if significant new information relevant to**
2 **such issues emerges after the close of Part 1.**

3 Finally, if closing briefs are allowed in Part 1 and the hearing proceeds to Part 2, Restore the
4 Delta requests that any party submitting a Part 1 closing brief be allowed to revisit in a supplemental
5 Part 1 closing brief, after the completion of Part 2, any issues raised in its Part 1 closing brief to
6 address any new information relevant to such issues that may emerge after the close of Part 1.
7 Relevant new information would include, but not be limited to, the contents of the biological
8 opinions that result from federal Endangered Species Act consultations on the Project, the results of
9 state review of the Project under the California Endangered Species Act, information that emerges
10 from other government agencies' permitting or review of the Project, future settlements with
11 protestants, and any substantial changes in the initial operating criteria that may result from the
12 emergence of such new information.

13 This request is consistent with prior rulings of the Hearing Officers indicating that new
14 information arising after the close of Part 1 may warrant revisiting Part 1 issues after the close of
15 Part 2. (*See Revised Hearing Schedule etc. (April 25, 2016)*, p. 3 [“Similarly, it may be necessary to
16 revisit Part 1 issues at the close of the hearing based on the information presented during Part 2
17 concerning appropriate Delta flow criteria. After conducting Part 2 of the hearing, we will evaluate
18 whether the record is adequate for purposes of formulating a decision on the petition, or whether any
19 Part 1 issues need to be revisited based on information presented during Part 2.”]); *Ruling on*
20 *Written Testimony...and Other Procedural Matters (October 7, 2016)*, p. 9 [if a party’s “interest in
21 Part 2 is only based on new information that may have a bearing on Part 1 issues, we have already
22 stated that it may be necessary to revisit Part 1 hearing issues after the close of Part 2 if substantial
23 changes to the final CEQA document or other information has a material bearing on Part 1 issues.”].

24 RTD thanks the Hearing Officers for their consideration of its views regarding closing briefs.

25 Dated: January 27, 2017

Respectfully submitted,



Trent W. Orr
A. Yana Garcia

Attorneys for Restore the Delta

1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have this day submitted to the State Water Resources Control Board
5 and caused a true and correct copy of the following document(s):

6 **STATEMENT OF ISSUES PROPOSED TO BE ADDRESSED**
7 **IN CLOSING BRIEFS FOR PART 1**

8 to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service**
9 **List** for the California WaterFix Petition Hearing, dated January 13, 2017, posted by the State Water
10 Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water_issues/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
11 [programs/bay_delta/california_waterfix/service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

12 I certify that the foregoing is true and correct and that this document was executed on
13 January 27, 2017.

14 Signature:  _____

15 Name: John W. Wall

16 Title: Litigation Assistant

17 Party/Affiliation: Protestant, Restore the Delta

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